89-1116

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Ted Bishop, Petitioner

v.

Oasis Oil Company, and David Fouracres,
Respondents

Petition for Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Ninth Circuit erred in dismissing the Petitioner's Complaint as against all the Respondents herein for failure to timely serve his Summons and Complaint in this matter pursuant to 28 USC 4(j) and the extensions granted by the United States District Court for the District of Arizona.

II. Whether the United States Court of Appeals for the Ninth Circuit erred in dismissing Petitioner's Complaint against Respondent, David Fouracres, for failure to timely serve his Summons and Complaint in this matter, pursuant to 28 USC 4(j) and the extensions

granted by the United States District Court for the District of Arizona absent a finding of bad faith or contumacious conduct.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Ted Bishop, Petitioner

vs.

Oasis Oil Company and David Fouracres,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, Ted Bishop, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States District Court for the District of Arizona

is unreported and is printed in Appendix A, Page i. The judgment and opinion of the United States Court of Appeals for the Ninth Circuit are unreported and are printed in Appendix A, Pages ii and vi.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 19, 1989. A timely Petition for Rehearing was denied by that Court on September 11, 1989. (Appendix A, Page iii). The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, §1254(I).

STATUTORY PROVISIONS INVOLVED

28 USC 4(j) provides: If a service of the Summons and Complaint is not made upon a defendant within 120 days after the filing of the Complaint. . ., the action shall be dismissed as to that defendant without prejudice upon the court's own initiative

with notice to such party or upon motion.

28 USC 4(E) provides: Whenever a statute or rule of court of the state in which the District Court is held provides (1) for service of a Summons, or of a notice, . . . upon a party not an inhabitant of or found within the state, . . ., service may in either case be made under the circumstances and in the manner, prescribed in the statute or rule.

A.R.S. §10-115(B) provides: . . . whenever a foreign corporation authorized to transact business in this state shall fail to appoint or maintain a statutory agent at the address shown on the records of the commission, the commission shall be an agent of such corporation upon whom any such process, notice or demand may be served.

Title 8, §321(B), Laws of Delaware provide: . . . it shall be lawful to serve the

process against the Secretary of State, . . . the Secretary of State shall forthwith notify the corporation, at its principle place of business. . . or, . . . at its last registered office.

STATEMENT

The Petitioner, Ted Bishop, is an engineer and has spent his adult life working for and with multinational corporations on building and development projects all over the world. In his last employment he was stationed in Libya before diplomatic relations and all business contacts between the United States and Libya were severed by the then President of the United States, Ronald Reagan. As part of Petitioner's job, he had the occasion, and need, to ride with one of the Respondents to this action, David Fouracres, who was an employee of a separate corporation, Respondent, Oasis Oil Company. As a result

of his job requirements, the Petitioner was injured while riding with Respondent Fouracres and has been unable to work since that time.

Between the time of the accident and the filing of this lawsuit in the United States District Court for the District of Arizona, Ted Bishop returned to the United States and Respondent Oasis Oil Company disbanded in its state of incorporation, Delaware, thereafter re-forming in England as Waha Oil Company. Respondent Fouracres continued in his employment, working on development projects all over the world while retaining his British citizenship.

Petitioner's Complaint against Oasis Oil Company and David Fouracres was filed by his then counsel, Marshall D. Tandy, on July 25, 1986 in the United States District Court for the District of Arizona. (Appendix A, Page xii). Jurisdiction was based upon

diversity of citizenship as Petitioner was, and is, domiciled in Arizona while Oasis Oil Company was, at that time, believed to be organized pursuant to the laws of the State of Delaware doing business in the State of Texas and David Fouracres was, and is, a citizen of the United Kingdom. The matter in controversy exceeded, exclusive of interest and costs, and does exceed, the sum of Ten Thousand Dollars ($10,000.00). An Amended Complaint was filed by Petitioner's present counsel, William B. Blaser, by leave of the United States District Court judge on February 24, 1987. (Appendix A, Page iv).

The United States Court of Appeals for the Ninth Circuit affirmed, on July 19, 1989, the judgment of the United States District Court for the District of Arizona, had on July 31, 1987, which dismissed the Petitioner's Complaint as against all the Respondents for failure to properly serve

the Respondents by July 16, 1987. (Appendix A, Page v). The dismissal by the District Court, and affirmation by the Appellate Court, points to several extensions, failure to act on the part of Petitioner's counsel and extensive delay in support of the dismissal.

The courts below are correct, that service upon David Fouracres was not timely, occurring some eight (8) days after the deadline of July 16, 1987. Delays in serving Mr. Fouracres had occurred in diplomatic channels. (Appendix A, Page vii).

Prior to the dismissal by the District Court, Petitioner voluntarily agreed to have a default judgment against Oasis Oil Company set aside after it was discovered that the Secretary of the State of Delaware had failed to properly notice that entity. (Appendix A, Page viii). On June 25, 1987,

six (6) weeks prior to the hearing at which Petitioner's Complaint was dismissed and approximately three (3) weeks before the July 16, 1987 deadline set by the District Court in which to effect service, Petitioner re-contacted the Secretary of the State of Delaware and requested that Oasis Oil Company be re-noticed. This fact is evidenced by copies of a letter to the Secretary of the State of Delaware requesting said re-notice, a check made payable to the State of Delaware for its services in that regard, a receipt for certified mail and a return receipt from the Secretary of the State of Delaware. (Appendix A, Page ix).

Shortly after the judgment of the Court of Appeals was entered, Petitioner's Petition for a Rehearing before that court was denied on September 11, 1989.

REASONS FOR GRANTING THE PETITION

In this case, the District Court and Court of Appeals have incorrectly applied 28 USC 4(J). The dismissal of Petitioner's Complaint against Respondent Oasis Oil Company is an error in that that entity was, in fact, properly served prior to the deadline set by the District Court. This error puts the courts below in conflict with other federal courts regarding the application of 28 USC 4(J).

Petitioner admits that its service upon Respondent Fouracres was not timely. There is, however, no question that Respondent Oasis Oil Company was served within the time extension granted by the District Court. (Appendix A, Page x). The record in this case is devoid of any indicia of bad faith or contumacious conduct on the part of Petitioner and demonstrates absolutely no prejudice to the Respondent

Oasis Oil Company. In fact, Petitioner voluntarily set aside a default judgment against Oasis Oil Company in order to ensure completely proper service of process upon that entity.

It is essential that this court grant further review of this matter. The District and Court of Appeal's interpretation of 28 USC 4(J) which dismissed a case against all of the Respondents for failure to properly serve one is flatly inconsistent with the plain meaning of 28 USC 4(J), is contrary to the application of 28 USC 4(J) in other District and Appellate Courts and ignores the concept of justice. In the alternative, should this court feel the present issue is not worthy of certiorari, Petitioner urges the court to summarily reverse the holdings below so as to allow

the Petitioner his day in court based upon the merits of his claim.

I.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AS AGAINST ALL THE RESPONDENTS FOR FAILURE TO TIMELY SERVE HIS SUMMONS AND COMPLAINT IN THIS MATTER PURSUANT TO 28 USC 4(J)

Petitioner freely admits his failure to serve Respondent Fouracres, said service having come some eight (8) days after the deadline of July 16, 1987, as set by the District Court. Further, Respondent Ted Bishop agrees that the District Court was fair in granting extensions to effectuate service in this matter. The fact is, however, that Respondent Oasis Oil Company was properly served prior to the July 16, 1987 deadline, having been served on March 23, 1987, and renoticed on June 25, 1987, six (6) weeks prior to the hearing at which Petitioner's Complaint was dismissed and approximately three (3) weeks before the

deadline set by the District Court. (Appendix A, Page ix). Admittedly, Mr. Bishop's counsel's failure to immediately notify the District Court that Oasis Oil Company had been renoticed through the Secretary of the State of Delaware is regrettable but should not preclude Mr. Bishop from having his day in court based upon the merits of his claim.

The purpose of service of process is to afford the Defendants notice of the pendency of the action against them. In determining whether process was sufficient, courts must look to whether or not there has been any material prejudice to the substantive rights of the complaining Defendant and whether any defects have been subsequently amended. (Emphasis added). Hawkins vs. Department of Mental Health, 89 F.R.D. 127, (W.D. Mich., S.D. 1981). While the Hawkins decision, supra, dealt with

defects relating to the naming of proper parties on the Complaint, as opposed to timeliness as here, the general principles derived therefrom are nevertheless applicable. It cannot be contended that Respondent Oasis Oil Company was unaware of the pendency of this action against it as David Anson, Esquire, specially appeared at a hearing to show cause on May 29, 1987, on behalf of Oasis Oil Company after Petitioner had filed an Application for Default. At that time it was discovered that the Secretary of the State of Delaware had failed to properly notice Oasis Oil Company pursuant to the laws of Delaware, Title 8, Section 321(B). Counsel for Petitioner therefore voluntarily agreed to set aside the default in order to correct the notice problem. A copy of Petitioner's letter with instructions, a check for the services of the State of Delaware, receipt for

certified mail and return receipt from the Secretary of the State of Delaware evidence that Oasis Oil Company was renoticed on June 25, 1987. (Appendix A, Page ix). In addition, Oasis Oil Company has not, to this date, asserted the existence of any material prejudice resulting from the first insufficient notice by the Secretary of the State of Delaware nor has the service made on March 23, 1987, ever been attacked or set aside.

The general principles set forth in Hawkins, supra, are longstanding. The failure of the Court of Appeals to follow them in this instance is inconsistent with other holdings espousing those same general principles. Tarbox vs. Walters, 192 F.Supp. 861 (E.D. Pa. 1961); basic purpose of Rules of Civil Procedure as to service is to assure that Defendant will actually get knowledge of the action against him and of

his duty to defend: Dobson vs. U.S. Army Finance and Accounting Center, 636 F.Supp. 894 (S.D. Ind. 1986); even though service was not technically correct, it was sufficient as it provided notice and Defendants did not seriously contend material prejudice resulted: Garrison vs. U.S., 688 F.Supp. 1469 (D. Nev. 1988); mere technical deficiency when remedied by amendment does not require dismissal of action.

In a similar case (procedurally speaking), wherein the Plaintiff failed to serve the individual Defendants but did properly serve the corporate Defendant, Alvarado-Morales vs. Digital Equipment Corp., 843 F.2d. 613 (1st Cir. 1988), the court dismissed the Complaint against the individual Defendants.

> "As a rudimentary, threshold, and partially dispositive matter, appellants admit that they failed to serve Summonses and copies of

> the Complaint on the three (3) named individual Co-Defendants. Only Digital Corporation was served. Appellants offered no good cause for this omission. The claims against the three (3) individuals are thus dismissible under Federal Rules of Civil Procedure 4(J)."

It is the Petitioner's position that the procedural disposition of the Alvarado-Morales decision, supra, would have been a correct disposition of the situation in this matter.

The record in the instant case irrefutably indicates that Respondent Oasis Oil Company was properly served within the time limits set by the District Court despite incredible logistical difficulties. The purpose of the Federal Rules of Civil Procedure regarding service of process, notice to the Defendant of the pending action in order to allow defense of said action, was accomplished. Further, there is no indication, nor has Oasis Oil Company

complained that such is the case, of any material prejudice. The only possible defect with regard to the service of process on Oasis Oil Company is the Petitioner's counsel's failure to notify the District Court that that entity had been properly noticed by the Secretary of the State of Delaware prior to the hearing at which the Petitioner's Complaint was dismissed as against all the Respondents.

Courts have been reluctant to punish parties for the inadvertent failures of their counsel absent findings of willfulness, bad faith or contumacious conduct on the part of counsel, Bishop vs. Cross, 790 F.2d. 39 (7th Cir. 1986); Gonzalez vs. Firestone Tire & Rubber Co., supra; Tolbert vs. Leighton, 623 F.2d 585 (9th Cir. 1980), of which the record in this matter is completely devoid. As stated in Patterson vs. Township of Grand Blanc,

760 F.2d. 686, (6th Cir. 1985), quoting Flaksa vs. Little River Marine Construction Co., 389 F.2d. 885, (5th Cir. 1968), wherein a dismissal based upon the dilatory conduct of the appellant's counsel (appearing, by substitution, unprepared at a pre-trial conference and failure to properly prepare during an eleven (11) day grace period granted by the court) was reversed:

> "The appellant was in no way connected with, or responsible for, his proctor's dilatory conduct. While we do not condone that conduct [of the attorney], we feel the circumstances of this case are not such that the appellant should lose his day in court."

In Patterson, supra, as here, the failure to properly notice the court was that of counsel and not the litigant. The Petitioner's counsel's failure to immediately notify the court that Respondent, Oasis Oil Company had been renoticed did not invalidate the original

service upon Oasis Oil Company and should not be the basis upon which to deny Ted Bishop his day in court based upon the merits of his claim. As stated in Patterson, supra, at 688:

> ". . . such dismissal with prejudice may be an abuse of discretion."

Here, due to the tolling of the statute of limitations, the dismissal without prejudice handed down by the court below is, for all practical purposes, a dismissal with prejudice. In cases such as this one, a dismissal serves only to overpromote judicial expediency at the expense of the basics of the legal system in this country, justice.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AGAINST THE RESPONDENTS ABSENT A FINDING OF BAD FAITH OR CONTUMACIOUS CONDUCT

The Petitioner admits his failure to serve Respondent, David Fouracres within the time limit set by the District Court, said service having been effected some eight (8) days after the deadline of July 16, 1987. (Appendix A, Page xi). Service was, however, made upon Respondent Oasis Oil Company on March 23, 1987, (Appendix A, Page x) although through no fault of Petitioner or his counsel, Oasis Oil Company had to be renoticed which was done by letter on June 25, 1987. (Appendix A, Page ix). As a result of Petitioner's failure with regard to the service on David Fouracres, his Complaint was dismissed without prejudice, not only as against Fouracres but also Oasis Oil Company, pursuant to 28 USC 4(J). It is

the Petitioner's contention that, because a dismissal without prejudice has the same effect as a dismissal with prejudice in this instance, that said dismissal, absent a finding of bad faith or contumacious conduct, was an abuse of the court's discretion.

There is considerable precedent indicating that a dismissal, the harshest of judicial sanctions, should be resorted to only in extreme cases.

> ". . . the law favors the disposition of cases on their merits, and that dismissal is a harsh sanction which should be resorted to only in extreme cases." Smith vs. Jostens Am. Yearbook Co., 78 F.R.D. 154 (1978) citing to Meeker vs. Rizley, 324 F.2d. 269, (10th Cir. 1963).

"Dismissal is a harsh sanction which should be resorted to only in extreme cases." Dyotherm Corp. vs. Turbo Machine Co., 392 F.2d. 146, (3rd Cir. 1968), see also: Johnson vs. Boyd Richardson Co., 650 F.2d.

147 (8th Cir. 1981); Johnson vs. Hubbard, 698 F.2d. 286, (6th Cir. 1983); Ellingsworth vs. Chrysler, 665 F.2d. 180, (7th Cir. 1981); Gonzalez vs. Firestone Tire & Rubber Co., 610 F.2d. 241, (5th Cir. 1980). In addition, courts have held that where lesser sanctions would best serve the interests of justice they should be pursued. Flaska vs. Little River Marine Construction Co., 389 F.2d. 885, (5th Cir. 1968); United States vs. Mazzone, 782 F.2d. 757, (7th Cir. 1985); United States vs. Mayer, 775 F.2d. 1387 (9th Cir. 1985); Jackson vs. Washington Monthly Co., 569 F.2d. 119 (D.C. 1977). Finally, the ultimate sanction of dismissal should be not imposed absent a finding of bad faith, delay or contumacious conduct. Thomas vs. Gerber Productions, 703 F.2d. 353, (9th Cir. 1983); Boazman vs. Economics Laboratory, Inc., 537 F.2d. 210, (5th Cir. 1976).

In this case, because the applicable statute of limitations has tolled, the dismissal without prejudice is, for all practical purposes, a dismissal with prejudice. As stated in Boazman vs. Economics Laboratory, Inc., supra, while a less stringent standard of review is ordinarily applied to a dismissal without prejudice because the Plaintiff is able to refile his suit, where, due to the tolling of the applicable statute of limitations, a dismissal without prejudice is no less severe than a dismissal with prejudice, it should only be so dismissed where "there was a clear record of bad faith or contumacious conduct." The record in this case does not demonstrate any indication of bad faith or contumacious conduct. While it is undeniable that there was delay in serving Mr. Fouracres, that delay was due to extremely unusual circumstances including:

difficulty in locating Mr. Fouracres due to the problems associated with obtaining information from sources in Libya during a time period when United States contact with Libya was at the least, tenuous, and at the most, extremely limited; the identification of a means by which to serve Mr. Fouracres in England once he had finally been located; and the problem of considerable delays in processing the necessary documents through diplomatic channels prior to their receipt by the process servers in England. (Appendix A, Page vii). Under such circumstances it can hardly be contended that Petitioner or his counsel acted in bad faith, intentionally delayed the pursuit of his claim or that any indicia of contumacious conduct is present. By not imposing available lesser sanctions than a dismissal without prejudice when said dismissal had the same effect as a dismissal

with prejudice, the United States Court of Appeals for the Ninth Circuit erred in favor of expediency and the trial calendar, thereby denying Ted Bishop his day in court based upon the merits of his claim precluding justice in this matter.

CONCLUSION

This Petition for a Writ of Certiorari should be granted based upon the foregoing or, in the alternative, a summary reversal should be granted the Petitioner in order that his claim be adjudicated on the merits rather than technical deficiencies with regard to the service of process.

RESPECTFULLY SUBMITTED this 29th day of December, 1989.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. CIV 86-423-TUC-WDB

TED BISHOP,

Plaintiff,

Versus

OASIS OIL CO. OF LIBYA, et al.,

Defendants.

O R D E R

The complaint in this case was filed on July 25, 1985. The complaint alleges that defendant David Fouracres is a citizen of the United Kingdom, and that Oasis Oil Company was believed to be a Delaware corporation. On August 21, 1986, plaintiff's counsel advised the Court that

Oasis Oil was believed to have dissolved its Delaware charter the month before.

There have been numerous extensions and several hearings to show cause why the case should not be dismissed for failure to serve the defendants in the year since this complaint was originally filed. On each such occasion, counsel for plaintiff indicated that service was imminent. Service was finally made upon the Secretary of State for Delaware, apparently pursuant to a Delaware law that authorizes the Secretary to continue as statutory agent for corporations for three years following their dissolutions, a result which could have obtained as early as August 21, 1986, when plaintiff's counsel first advised the Court that Oasis Oil was a defunct Delaware corporation.

The last OSC was scheduled for June 1, 1987, and continued to June 16,

1987. At that time, on plaintiff's motion the Court set aside the default against Oasis Oil for some defect in the service that had been made by the Delaware Secretary of State, and further ordered that claims against David Fouracres would be dismissed if he were not served within thirty days. Now the plaintiff's counsel advises this Court that the defendant may have been served on July 25, 1987. The Court's record shows no further action by plaintiff to correct service as to the defunct Delaware corporation. Dismissal pursuant to Fed. R. Civ. P. 4(j) appears well warranted on the record now before the Court in this matter. See Edwards v. Edwards, 754 F.2d 298 (9th Cir. 1985).

IT IS ORDERED that this case is DISMISSED as to all defendants for failure to serve the defendants within the limits of

Fed. R. Civ. P. 4(j) and of Court authorized extensions to the time limits thereof.

DATED this 31 day of July, 1987.

/s/ William D. Browning
WILLIAM D. BROWNING
U.S. District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED BISHOP,

Plaintiff-Appellant,

v.

OASIS OIL COMPANY, a Delaware corporation; DAVID FOURACRES,

Defendants-Appellees.

No. 87-2674
DC No. CV-86-0423-WDB

MEMORANDUM[1]

Appeal from the United States District Court for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted April 6, 1989
San Francisco, California

Before: POOLE, REINHARDT, and O'SCANNLAIN, Circuit Judges

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

This personal injury case arises out of an accident which occurred in North Africa near Gialo, Libya, on or about July 28, 1984. Bishop was riding with Fouracres, a British engineer employed by Oasis Oil Company ("Oasis"), in an Oasis-owned jeep when it hit a soft spot resulting in injuries to Bishop, an Arizona resident.

Bishop's attorney, Tandy, filed this complaint on July 25, 1986, three days before the original statute of limitations would have run under Arizona law. On August 29, 1986, Tandy's request for an extension of time in which to locate and serve defendants was granted in an order which required Tandy to cure the jurisdictional defects in the complaint within sixty days "or the case shall be dismissed." Bishop was granted a further extension on October 31, 1986.

Thereafter, Tandy withdrew as counsel

and new counsel requested another time extension to prepare an amended complaint and to serve the defendants. On March 10, 1987, Judge Browning filed a minute order setting a March 30 hearing (later reset to June 1) for Bishop to "show cause why this case should not be dismissed for failure to serve any defendant within the extensions granted by th(e) Court." On March 31, Bishop filed with the district court Clerk evidence of service against Oasis. On May 29th, Bishop moved for a default judgment against Oasis pursuant to Fed. R. Civ. P. 55(a) which was granted by the Clerk on June 1. On the same date, Judge Browning vacated the June 1 hearing and set June 8 as the date for Bishop to show cause why the complaint should not be dismissed as to Fouracres and set July 1 as the date by which Bishop "shall file a brief showing why the service he has effected on the corporate

defendant is valid." On June 16, Judge Browning granted Bishop another thirty days to serve Fouracres and granted Oasis' motion to vacate the default judgment. The record discloses that the brief due by July 1 was never filed.

On July 31, 1987, no proof of service on Fouracres having been received, Judge Browning dismissed Bishop's complaint for "failure to serve the defendants within the limits of Fed. R. Civ. P. 4(j) and of court authorized extensions to the time limits thereof." Bishop filed a motion for reconsideration. Attached to that motion was an exhibit purporting to show that Fouracres was served on July 25, 1987. Also attached to that motion was a "Receipt For Certified Mail" signed by Robert Kreighbaum of the Department of State of the State of Delaware and dated June 25, 1987 suggesting service on Oasis as of that date. The

motion for reconsideration was denied. Bishop timely appeals. Appellees have made no appearances in this court.

I

The district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986); Ash v. Cvetkov, 739 F.2d (9th Cir. 1986), cert. denied, 470 U.S. 1007 (1985).

The factors to be weighed in determining whether or not the district court has abused its discretion as (1) the plaintiff's diligence; (2) the trial court's needs to manage its docket; (3) the danger of prejudice to the party suffering the delay; (4) the availability of alternative sanctions; and (5) the existence of warning to the party occasioning the delay. Hamilton v. Neptune Orient Lines, Ltd., 811

F.2d 498, 499 (9th Cir. 1987). Warnings by a district court that dismissal will result from failure to comply with its orders are a sufficient consideration of alternative sanctions to support dismissal. Greco v. Stubenberg, 859 F.2d 1401, 1404 (9th Cir. 1988).

Judge Browning provided warnings on May 10 and June 1, 1987, that failure to serve Fouracres would result in dismissal of claims against him. Bishop failed to effect service of process upon Fouracres within the extensions provided by the district court. Despite opportunities to do so, Bishop failed to request further extensions. Since Bishop cannot establish any factor under Hamilton which weighs against the district judge's dismissal of Fouracres, we hold that dismissal of the complaint as to Fouracres did not constitute an abuse of discretion.

II

Bishop further claims that service upon Oasis was proper and that dismissal was inappropriate. At oral argument in this court, Bishop's attorney claimed that the evidence of service on oasis filed on March 31 constituted valid service of process. Had such service been valid, Bishop nevertheless failed to comply with the court's request to brief the validity of such service by July 1.

The record also contains the June 25 "Receipt for Certified Mail" signed by the Department of State of the State of New Jersey. Bishop claims that this evidences valid service of process on Oasis. Even if it were valid, it occurred beyond the time, as extended, within which service was to be made. Bishop failed to brief the validity of the March service, contrary to court

order, and failed to ask for a further extension.

In any event, the certified mail receipt is, at best, dubious evidence of service. There is simply no valid explanation why the June 25 receipt was not disclosed to the court before August 13, in face of specific orders to justify validity of service, especially since proof of the March 25 purported service was filed within six days.

III

In light of the record before us, we cannot conclude that Judge Browning's rulings constituted an abuse of discretion.

AFFIRMED.

Bishop v. Oasis Oil, No. 87-2674

Reinhardt, J., dissenting:

Ted Bishop was seriously injured in a jeep accident in Libya. He was confronted with the daunting task of trying to effect service of process on a defunct Delaware corporation that had abandoned its Delaware corporate charter and reincorporated in Great Britain and on an English resident whose address was unknown. He sought to serve process on the then-defunct Oasis Oil entity through the Delaware Secretary of State, as authorized by Delaware law, but the Secretary of State apparently did not comply, at least initially, with its statutory mandate and Oasis Oil was not properly served.[1] However, on June 25,

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[1] After filing his complaint, Bishop first attempted to serve process on Oasis Oil and David Fouracres at the corporation's Houston address. He then discovered that Oasis Oil had changed its country of incorporation.

1987, six weeks before the July 31, 1987 hearing at which Bishop's complaint as dismissed, Bishop again filed with the Delaware Secretary of State to have Oasis served.

Meanwhile, Bishop had discovered the whereabouts of David Fouracres and had hired a company specializing in international service of process to effect service on him. Apparently, Fouracres was served before the July 31 hearing, but return of service from England was delayed. The district court was informed of this by letter before the hearing.

Thus, Bishop had apparently served both of the hard-to-locate defendants in this case before the district court dismissed his complaint for failure to effect service. The court was indisputably informed that service had been accomplished before it denied Bishop's motion for reconsideration.

Accordingly, I cannot agree with the majority that the district court did not abuse its discretion in dismissing the complaint.

It may be true, as the majority points out, that Bishop's attorney should have been more diligent in keeping the district court informed of the status of the efforts being made to complete service of process and, indeed, of the ultimate success of the venture. Perhaps some sort of sanction against the attorney for his failure to do so might have been appropriate. It is also true that the district judge at times exhibited considerable forbearance. But this does not change the fact that service was completed before the district court adopted the ultimate sanction and dismissed Bishop's complaint. Under the circumstances of this case, I do not believe Bishop should be compelled to forfeit his right to sue the

alleged tortfeasors. I would hold that the district court abused its discretion in dismissing Bishop's complaint. Accordingly, I dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED BISHOP, Plaintiff-Appellant,

v.

OASIS OIL COMPANY, a Delaware corporation; DAVID FOURACRES, Defendants-Appellees.

No. 87-2674
DC No. CV-86-0423-WDB

O R D E R

Before: POOLE, REINHARDT, and O'SCANNLAIN, Circuit Judges.

The petition for re-hearing is DENIED. Judge Reinhardt would grant the petition.

TED BISHOP, Plaintiff

vs.

OASIS OIL COMPANY OF LIBYA, a Delaware corporation; and DAVID FOURACRES, Defendants.

No. CIV 86-423-TUC-WDB

AMENDED COMPLAINT

COMES NOW the Plaintiff, TED BISHOP, by and through his attorneys, BLASER, KELLY & DON, P.C., and for his Complaint against the Defendants, OASIS OIL COMPANY OF LIBYA, and DAVID FOURACRES, alleges as follows:

I.

That the Plaintiff is a citizen of the State of Arizona.

II.

That the Defendant, OASIS OIL COMPANY OF LIBYA, is a Delaware corporation, with its prinicple place of business in the country of Libya, and a United States

office in Houston, Texas. Defendant Oasis Oil Company of Libya is a legal citizen of the State of Delaware.

III.

That the Defendant, DAVID FOURACRES, is a citizen of the United Kingdom.

IV.

Federal jurisdiction is predicated upon diversity of citizenships; the amount in controversy exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

V.

At all times material hereto, Plaintiff, TED BISHOP, was employed by Craddock Engineering, and was assigned to perform his job in Libya.

VI.

That on or about July 28, 1984, DAVID FOURACRES was an employee of OASIS OIL COMPANY. At all relevant times, each

Defendant was the agent and employee of the remaining Defendants, and was acting within the purpose and scope of that agency and employment, and each Defendant ratified and approved the acts of his agent.

VII.

On or about July 28, 1984, while the Plaintiff and the Defendant DAVID FOURACRES were working in Libya, the Plaintiff was a passenger in a vehicle operated by DAVID FOURACRES, and owned and supplied by OASIS OIL COMPANY for DAVID FOURACRES.

VIII.

That on or about July 28, 1984, DAVID FOURACRES, while driving the vehicle supplied to him by OASIS OIL COMPANY, did so negligently, carelessly and recklessly control the motor vehicle that he was then and there driving, so as to cause the same to be involved in a one vehicle accident,

injuring his passenger, the Plaintiff, TED BISHOP.

IX.

That as a direct and proximate result of the negligence, carelessness and recklessness of the Defendants, the Plaintiff, TED BISHOP, sustained grievous injuries to his person, all to his damage in a presently unascertainable amount, but over the jurisdictional limit of Ten Thousand Dollars ($10,000.00).

X.

That solely by reason of the premises, and as a consequence thereof, the Plaintiff, TED BISHOP, has required and continues to require the services of physicians, radiologists, medical attendants and like personnel, all to the Plaintiff's damage in a presently unascertainable amount.

XI.

That solely by reason of the premises,

and as a consequence thereof, the Plaintiff, TED BISHOP, has not been able to perform his usual employment duties, and will be unable to perform his usual employment duties in the future, all to the Plaintiff's damage in a presently unascertainable amount, but in an amount greater than Ten Thousand Dollars ($10,000.00).

XII.

That solely by reason of the premises, and as a consequence thereof, the Plaintiff, TED BISHOP, has been inflicted with pain, suffering mental anguish, loss of enjoyment of life, inability to perform employment duties and other such damages, all to the Plaintiff's damage in a presently unascertainable amount, but over the jurisdictional limit of Ten Thousand Dollars ($10,000.00).

XIII.

The injuries suffered by the Plaintiff, TED BISHOP, as a result of the negligence of the Defendants, are permanent in nature, and the Plaintiff will be permanently disabled, and will endure pain and suffering and other damages mentioned herein for the rest of his natural life, all as a result of the Defendant's negligence, all to the Plaintiff's damage in a presently unascertainable amount, but greater than the Ten Thousand dollars ($10,000.00) jurisdictional limit.

XIV.

The Defendant, DAVID FOURACRES, was at all times material hereto, an employee of OASIS OIL COMPANY, and was acting within the scope and course of his employment, and with the knowledge and consent of the Defendant, OASIS OIL COMPANY, at the time of the accident on July 28, 1984.

XV.

The Defendant, OASIS OIL COMPANY, knew or should have known of the driving ability, skills, and records of the Defendant, DAVID FOURACRES, and that said Defendant, DAVID FOURACRES, was on a mission or errand for OASIS OIL COMPANY, for the benefit of OASIS OIL COMPANY, and the Defendant OASIS OIL COMPANY, was negligent in entrusting the Defendant, DAVID FOURACRES, with the automobile and sending him on the mission or errand.

XVI.

The actions of the above-named Defendants, and each of them, were willful, wanton, and in complete disregard for the safety and well-being of the Plaintiff, TED BISHOP; that said conduct, has damaged the Plaintiff is a presently unascertainable amount, but more than the Ten Thousand Dollars ($10,000.00) jurisdictional limit;

that punitive damages can and should be assessed in an amount sufficient to punish and deter the willful, wanton, and malicious conduct of the Defendants as set forth herein.

WHEREFORE, the Plaintiff demands judgment as follows:

1. For judgment against the Defendants, and each of them, for his compensatory damages, in a sum to be proven at the time of Trial, in excess of Ten Thousand Dollars ($10,000.00);

2. For costs and expenses incurred in prosecuting this action; and,

3. For such other and further relief as the Court deems proper in the premises.

DATED this 24th day of February, 1987.

By: William B. Blaser
Attorney for Plaintiff

v

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TED BISHOP

v.

OASIS OIL CO. OF LIBYA, et al.

CIV 86-423-TUC-WDB

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is DISMISSED as to all defendants for failure to serve the defendants within the limits of Fed. R. Civ. P. 4(j) and of Court authorized extensions to the time limits thereof.

July 31, 1987

RICHARD H. WEARE,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED BISHOP, Plaintiff-Appellant,

vs.

OASIS OIL COMPANY, a Delaware corporation; DAVID FOUPACRES, Defendants-Appellees,

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87-2674

CV-86-0423-WDB

JUDGMENT

APPEAL from the United States District Court for the TUCSON District of ARIZONA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the TUCSON District of ARIZONA and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered July 19, 1989.

Attorney's Process Service, International

Franklin National Bank Building

100 West Franklin Avenue

Minneapolis, Minnesota 55404 - 612-871-0040

Date: August 6, 1987

RE: Bishop vs. Oasis Oil Company

Served On: David Fouracres

Date Served: July 25, 1987

ENCLOSED IS YOUR PROOF OF SERVICE IN THE ABOVE-REFERENCED CASE. THANK YOU FOR USING APS.

COMMENTS: Please note that date of service does not indicate the date upon wich documents are received by APS. There is considerable delay in processing the documents through diplomatic channels before APS receives them.

Thank you for using APS!

July Bemis
International Dept.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Civil Case No. 86-423-TUC-WDB

Date: 6/16/87

Title: Ted Bishop vs. Oasis Oil Co.

Present:

Hon. William D. Browning, Judge

Patricia Moreno, Deputy Clerk

Toni Karaca, Court Reporter

Attorney for Plaintiff:

William Blaser

Attorney for Defendant:

_____

_____

PROCEEDINGS: _X_ Open Court

Order to Show Cause:

Order default entered against defendants Oasis Oil is vacated.

Further order the Order to Show Cause is continued for a period of thirty days and if at that time no service has been made on

Fouracres, this case will be dismissed as to that defendant.

June 25, 1987

Department of State

Division of Corporations

P. O. Box 989

Dover, Delaware 19903

RE: Bishop vs. Oasis
Oil Corporation

Dear Sir/Madam:

Pursuant to Section 321 of Title 8, please notify the afore-named corporation by Certified Mail, Return Receipt Requested, at its principal place of business as appears on the annual report dated February 28, 1986, that a lawsuit has been filed against them. I am enclosing the Summons and a copy thereof and a copy of the Complaint for you to forward and a check for $25.00 as per Section 321(b).

Thank you for your attention in this matter.

Respectfully,

BLASER, KELLY & DON, P.C.

William B. Blaser

P 475 680 102

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Dept of State	
Street and No. P.O. Box 848	
P.O., State and ZIP Code Dover, Delaware 19903	
Postage	$ .56
Certified Fee	1.45
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$ 2.01
Postmark or Date 6-25-87	

PS Form 3800, Feb. 1982 * U.S.G.P.O. 1984-446-014

S Form 3811, July 1983 447-845

DOMESTIC RETURN RECEIPT

SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to:
Dept. of State
Div. of Corporations
P.O. Box 898
Dover, Del. 19903

4. Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Article Number
P 175 680 102

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – ~~Addressee~~ U.S.A. SERVICES
X ROBERT KREIGHBAUM

6. Signature – Agent
X

7. Date of Delivery
JUN 29 1987

8. Addressee's Address *(ONLY if requested and fee paid)*

BLASER, KELLY, & DON, P.C.
ORACLE EXECUTIVE PLAZA 602-297-8386
7493 N. ORALCE RD. STE. 105
TUCSON, AZ 85704

№ 6208

June 25, 19 87

91-2/1221

PAY TO THE ORDER OF DEPARTMENT OF STATE, DIVISION OF CORPORATIONS $ 25.00

---------- Twenty-Five and 00/100 ----------
DOLLARS

CASA BLANCA OFFICE (111)
P.O. Box 35760
Tucson, Arizona 85740-5760

Bishop vs. Oasis Oil
Service of Process

⑈006208⑈ ⑆122100024⑆ 2036⑈2578⑈

Thomas S. Kelly III

EXHIBIT 3

x

RETURN OF SERVICE

Service of the Summons and Complaint was made by me: Kevin Dunn

Title: Process Server

Date: March 23, 1987

Served Oasis Oil Company of Libya, a void Delaware Corporation by serving the Delaware Secretary of State (per Mindy Gardner) at the office of the Delaware Secretary of State, Townsend Building, Dover, Delaware 19901

STATEMENT OF SERVICE FEES

Travel -0- Services $40.00

Total $40.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 3/22/87

/s/ Kevin Dunn
Signature of Server

405 Brandywine Blvd., Wilmington, DE 19809
Address of Server

*Amended Complaint

PROOF OF SERVICE

CASE: Bishop, et al., Plaintiff

vs.

Oasis Oil Company, et al., Defendants

Service of Process on: David Fouracres

NAME OF SERVER: Raymond Mark Parker, undersigned, being duly sworn, deposes and says that he was at the time of service, over the age of twenty-one, was not a party to this action:

DATE OF SERVICE: that on the 25th day of July, 1987 at Two o'clock p.m.

PLACE OF SERVICE: at 95 West Way in the Borough of Bournemouth, County of Dorset.

DOCUMENT SERVED: the undersigned served the annexed papers, to wit: Summons and Complaint.

PERSON SERVED: a true and correct copy of the aforesaid papers were served on the above-named party or witness in the following manner:

DESCRIPTION OF PERSON RECEIVING DOCUMENTS: The person receiving documents is described as follows: Sex: Male; Skin Color: White; Hair Color: Mid brown; Facial Hair: None; Age (prox.) 48; Height (prox.) 5 ft. 8 inches; Weight (prox.) 210 pounds.

To the best of my knowledge I believe said person was not engaged in the U.S. Military at the time of service.

SIGNATURE OF SERVER: Undersigned declares under penalty of perjury that the foregoing is true and correct. /s/ R. M. Parker

Subscribed and Sworn to before me this 27th day of July, 1987.

Notarization Not Required (International Declaration)

ATTORNEY'S PROCESS SERVICE INTERNATIONAL, INC. Seal.

UNITED STATES DISTRICT COURT

STATE OF ARIZONA

TED BISHOP, Plaintiff,

vs.

OASIS OIL COMPANY, a Delaware corporation; and DAVID FOURACRES, Defendants.

CIV 83-706 TUC

COMPLAINT FOR DAMAGES ARISING FROM PERSONAL INJURIES

I

Jurisdiction is based upon diversity of citizenship and the amount in controversy. Plaintiffs, TED BISHOP, is a citizen of the State of Arizona; Defendant, OASIS OIL COMPANY, is a corporation believed to be organized pursuant to the laws of the State of Delaware and doing business in the State of Texas; DAVID FOURACRES is a citizen of the United Kingdom. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand

Dollars ($10,000.00).

II

At all times material hereto the Plaintiff, TED BISHOP, was employed by Craddock Engineering and was assigned to perform his job in Libya.

III

On or about July 28, 1984, Plaintiff was a passenger in a vehicle which was operated by DAVID FOURACRES. DAVID FOURACRES operated the vehicle in such a negligent manner and failed to maintain control of the vehicle, all of which resulted in a one vehicle accident. Plaintiff, as a direct and proximate result of the Defendant's negligence, suffered serious and permanent injuries requiring Plaintiff to expend funds in the past and in all likelihood to expend funds in the future for medical and other related costs. As a further direct and proximate result of the

accident, the Plaintiff has suffered diminished earning capacity and loss of income in amounts which are not presently ascertained.

IV

The Defendant, DAVID FOURACRES, at all times material hereto, was an employee of OASIS OIL COMPANY and was acting within the scope and course of his employment and with the knowledge and consent of the Defendant OASIS OIL COMPANY at the time of the accident on July 28, 1984.

WHEREFORE, Plaintiff demands judgment as follows:

1. For Judgment against the Defendants in a sum to be proven at trial in excess of $10,000.00, plus costs.

2. For such other and further relief as the Court deems just and proper.